United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

United States Court of Appeals
Second Circuit

Docket No.:
76-7547

NORTHEASTERN INDUSTRIAL PARK, INC. and
D. E. LONG, INC.

Plaintiffs,

-and-

NORTHEASTERN INDUSTRIAL PARK, INC.,
Plaintiff-Appellant,

Vs.

LOCAL 294, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF AMERICA,

Defendant-Appellee

BRIEF OF APPELLEE LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

POZEFSKY, TOCCI & POZEFSKY
Attorneys for Local 294, International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
Office & P.O. Address
112 State Street
Albany, New York 12207
(518) 436-0717

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ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y.
12207
TELEPHONE
(518) 436-0717

UNITED STATES COURT OF APPEALS - SECOND CIRCUIT

NORTHEASTERN INDUSTRIAL PARK, INC. and D. E. LONG, INC., Plaintiffs, -and- NORTHEASTERN INDUSTRIAL PARK, INC., Plaintiff-Appellant, Vs. LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Defendant-Cross Appellant.	DOCKET NO. 76-7547

BRIEF OF CROSS-APPELLANT LOCAL 294 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

This case is before this Court upon an appeal by plaintiff-appellant Northeastern Industrial Park, Inc. (Northeastern) from so much of an order and judgment of the United States District Court for the Northern District of New York, as disallows Northeastern's claim for inclusion of certain attorneys' fees and legal expenses as an element of damages allegedly sustained because of unlawful picketing by defendant-appellee Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union); and further, upon a cross-appeal by the Union from so much of the order and judgment of the District Court as allowed certain other compensatory damages to plaintiff

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D. E. Long, Inc. (Long). The Memorandum Decision and Order of District Court Judge James T. Foley, dated September 30, 1976, and the Order and Judgment based thereon, dated November 10, 1976, are unreported.

COUNTER-STATEMENT OF FACTS

This is a suit for damages by Northeastern and Long against the Union under Section 303 of the Labor Management Relations Act, 9 U.S.C. Section 187 (the Act). It alleges violations of Section 8(b)(4)(i)(B) and (ii)(B) of the Act, arising out of the Union's picketing and other conduct in connection with disputes with R & R Handling Centres, a tenant at the large industrial park complex owned by Northeastern, and with Long, another tenant in the park.

The Union began picketing the R & R Handling Centres building within the industrial park on March 25, 1971 (A122 - A124)[1/] and subsequently picketed outside the park. At or about 5 p.m. on March 29, 1971 the Union began picketing the tenant Long at the main gate (A134 -A135), the gate designated for Long, carrying signs saying: "Office and clerical workers of D. E. Long do not receive the benefits and protection of a Teamsters Local 294 contract." (A197). This picketing continued until April 9, 1971, when it was restrained by the District Court in a proceeding brought by

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1/ References to the transcript of the trial of this action and all other matters set forth in the Appendix are denoted as "A" followed by the appropriate page number.

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the National Labor Relations Board (NLRB) for an injunction pursuant to Section 10 (l) of the Act. No further picketing was carried out at the main gate of the industrial park.

Separate unfair labor practice charges were filed with the NLRB against the Union by Northeastern and by Rotterdam Ventures, Inc., which is not a party to this suit (A113 - A116). Long filed no unfair labor practice charges against the Union. The charges filed by Northeastern and Rotterdam Ventures Inc. were consolidated by the NLRB and after a joint complaint was issued and a joint hearing held, the Union was found to have violated the aforementioned sections of the Act (Defendant-Union's Exhibit "A"). At the time of the hearing before the NLRB, R & R Handling Centres, Inc. had gone out of business and terminated its occupancy of the industrial park (A138). By memorandum decision dated October 1, 1975, the District Court, based on the NLRB Decision, granted summary judgment on the issue of liability in favor of Northeastern.

Long and the Union were parties to a labor agreement, which, though unsigned, they duly adopted. They abided by this agreement and effectuated its provisions (A170-A176, A192, A193, A197, A198-A203) including the making and paying of reports and contributions required to be made and paid thereunder on behalf of Long's employees to the Union's Pension Fund and Welfare Fund (A177 - A181), and the use of contractual grievance procedures (A198 - A203), all without any objection or reservation by Long. The agreement contained a grievance procedure which requires the sub-

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mission thereunder of certain disputes prior to the institution of any damage action (Defendant-Union's Exhibit M, Article 8, Section 3(b)/). A95-97 No such submission to the grievance procedure was made by Long prior to the institution of this Section 303 suit.

Long sought damages limited to certain fixed expenses and overhead items. The damages were based on Long's calculations, utilizing operating costs over an extended period of time, mathematically adjusted by Long to reflect costs and expenses during the work stoppage in question. Long submitted no evidence at the trial as to loss of profits or business.

Northeastern's claim for damages was limited to attorneys' fees and disbursements incurred in connection with the aforementioned 10 (1) injunction proceedings in the District Court in April 1971 and the administrative unfair labor practice proceedings before the NLRB beginning in June, 1971. Northeastern claims $30,506.45 in such legal fees and disbursements. $28,326.45 of these were billed jointly by Robert Jones, III, Esq. to Northeastern and to Rotterdam Ventures, Inc. which was not a party to this suit and for which no recovery was sought herein, but on behalf of which a substantial amount of the work was performed. Mr. Jones, whose legal fees constitute the bulk of Northeastern's claim, appeared on behalf of both companies before the NLRB; his extensive briefs first to the Administrative Law Judge and then to the NLRB itself, were submitted on behalf of both companies as well. (See Defendant-Union's Exhibits B -A91 and Exhibit C-A92-94 and A113-118).

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Evidence at the trial showed that picketing ended on April 9, 1971 (A135). Robert Jones, III spent a total of 74.8 hours on this case, from April 1, 1971, when he was engaged, to April 9, 1971 (Plaintiffs-Appellants' Exhibits 1 - 5, A74-A89). He testified that his hourly rate was $85.00 (A119). The Union submitted evidence that the prevailing hourly rate in the Albany area in 1971 was $50.00 an hour for trial work and $40.00 an hour for office work (A162). The balance of the legal fees claimed by Northeastern on behalf of Mr. Jones represents services rendered after April 9, 1971, the date on which the picketing ended and work resumed.

Northeastern's claim for damages also included attorney's fees paid to Frank J. Williams, Jr. in the sum of $2,180.00 (A159). Mr. Williams testified that his services were rendered in a supportive and secondary role to those of Robert Jones, III (A157) and, further, that his services benefitted Long, which made no claim for attorneys' fees in the instant actions, and Rotterdam Ventures, Inc., which is not a party to this proceeding as well as Northeastern (A161). Mr. Williams billed only Northeastern pursuant to an arrangement which he had with them and Northeastern paid him (A161).

Trial of the action on the damage issue, with regard to Northeastern, and on both liability and damages, with regard to Long, was held before District Court Judge James T. Foley in October, 1975.[2/] The Court held that the Union had committed certain unfair labor practices for which it was liable to Long in damages, and awarded Long damages in the

2/ By Decision and Order dated October 1, 1975, the District Court granted Summary Judgment in favor of Northeastern alone on the issue of damages.

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sum of $5,154.00, the amount demanded in the Complaint. Long had submitted no evidence of loss of profits or business, and none of the damages awarded were based on these considerations.

The Court denied Northeastern's claim for attorneys' fees and disbursements, as a matter of law.

COUNTER-STATEMENT OF ISSUES

1. Whether the District Court erred in holding that Plaintiff Long and Appellee-Cross-Appellant Union were not parties to a labor contract which necessitated that Long subject itself to prior arbitration before commencing the instant section 303 action.

2. Whether the District Court erred in finding that Long was entitled to damages amounting to $5,154.00 for unproductive overhead costs.

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POINT I - PLAINTIFF NORTHEASTERN'S CLAIM FOR ATTORNEYS' FEES AS AN ELEMENT OF DAMAGES WAS PROPERLY DENIED BY THE DISTRICT COURT, AS A MATTER OF LAW

The United State Supreme Court, in Alyeska Pipeline Services Co. vs. Wilderness Society 421 U.S. 240 (1975), re-examined the question of whether attorneys' fees may be awarded as an element of damages, costs or otherwise. The Court exhaustively reviewed common law and statutory precedents and reaffirmed the established federal principle that a litigant may not recover attorneys' fees absent specific and expressed statutory provision therefor, with certain exceptions not pertinent herein. The Supreme Court pointed out that Congress, not the Courts, must determine those situations in which an award of attorneys' fees is permissible. In the Supreme Court's words, Congress has never:

> "...extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the Courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes." (footnote omitted) (emphasis added) 421 U.S. at 260.

The Court's footnote, at pages 260 - 261, cites a variety of statutes as examples wherein Congress, by language both specific and explicit, has authorized the awarding of attorney's fees. Nowhere in Section 303 of the Act is there any reference to the allowance of attorneys' fees, and so, of course, Section 303 is not included in the Supreme Court's list of examples of express congressional exceptions to the general rule.

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Following the Alyeska decision, in October, 1975, the same month the instant case was being tried, the Ninth Circuit Court of Appeals, citing and relying on Alyeska, held in a carefully reasoned decision that attorneys' fees for prior proceedings before the NLRB may not be recovered as an element of damages in a Section 303 suit for damages caused by an illegal secondary boycott. Meads Market vs. Retail Clerks Local 839, 523 F2d 1371, 90 LRRM 2769 (CA 9, 1975).[2a/] That is the question squarely presented for determination on this appeal. The Meads Market case was the first (and so far as the Union's research to date has disclosed, apparently the only) Circuit Court of Appeals case since Alyeska involving the very question at issue here. In reaching its decision, the Meads Market Court stated:

> "As Professor McCormick put it, 'obviously a party who wins a lawsuit cannot escape the rule that expenses of litigation beyond taxable costs are not recoverable, by merely instituting a new suit for expenses in the first case.' (See McCormick, Damages, Section 67 at 49, 1935)." (523 F.2d at 1381)

Moreover, the Meads Market Court noted that by virtue of the NLRB's authority pursuant to 29 U.S.C. Section 160 (c) to "take such affirmative action...as will effectuate the policy of (the Act)", Congress has left it to the NLRB, not the Courts, to determine appropriate remedies under the Act. While the NLRB, too, generally has adhered to the "American Rule" that a prevailing party's attorneys' fees are not ordinarily recoverable, it has carved out a limited exception, awarding attorneys'

2a/ For cases relying on Alyeska to deny attorneys fees in the absence of express statutory authority, see also General Drivers v. Sears Roebuck & Co., 535 F.2d 1072, 92 LRRM 2980 (CA 9 1976); IBEW Local No. 12 v. A-1 Electric Service, Inc., 535 F.2d 1, 91 LRRM 2747 (CA 10 1976); Foley v. Devaney, 528 F. 2d 888, 91 LRRM 2307 (CA 3 1976) and Kellog Co. v. International Printing Pressmen, 401 F. Supp. 207, 92 LRRM 2365 (W.D. Mich. 1976).

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fees and other costs of litigation in NLRB proceedings where it finds specifically that the charged party's defense before the NLRB was frivolous or in bad faith. Tiidee Products 194 NLRB 1234, 79 LRRM 1175 (1972) modified and enforced, 502 F2d 349, 86 LRRM 2093 (DC Cir. 1974) Heck's Inc. 215 NLRB No. 148, 88 LRRM 1049 (1974). See also NLRB vs. Food Store Employees, Local 347 (Heck's Inc.) 191 NLRB 886, N. 19, 77 LRRM 1513 (1972), modified and enforced, 476 F2d 546, 83 LRRM 2955 (DC Cir. 1973) reversed on other grounds 417 U.S. 1, 86 LRRM 2209 (1974).

The attorneys' fees claimed by Northeastern in the instant case are those fees incurred in proceedings had pursuant to the Act prior to the instant suit. The NLRB did not award attorneys' fees to appellant (there, charging party) Northeastern directly; therefore, this Court should not authorize such fees indirectly. As the Court in Meads Market stated:

> "...if attorneys' fees incurred in Board proceedings could be recovered in every case by subsequent Section 303 action, it would circumvent the Board's rule allowing recovery of such fees only where the defense is frivolous or in bad faith."
> (523 F2d at 1381)

Appellants attack the Meads Market Court's reliance on the fact that the NLRB can award attorneys' fees in its proceedings, arguing that the United States Supreme Court, in NLRB vs. Food Store Employees Union Local #347, (Heck's Inc.), 417 US 1, "while not expressly passing on the question has nevertheless cast strong doubt on the authority of the Board to award attorneys' fees." (Appellants' Brief, Page 26). In

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actuality, the Supreme Court in the Heck's case held that the Court of Appeals, as an Appellate Court reviewing and enforcing an NLRB order in a cease and desist proceeding wherein the NLRB refused to award attorneys' fees, could not modify the NLRB order by imposing such attorneys' fees for the first time at the appellate level. There is no similarity between that case and the case at bar. In any event, by dicta in its opinion, the Supreme Court recognized that in an appropriate case the NLRB itself could indeed have awarded such fees. (417 U.S. at page 8).

Additionally, the Court in Meads Market added the following:

> "...the determination of whether a Union's conduct violates Section 8(b)(4) may be made either by the Board as in this case, or by the Court in a suit under Section 303. International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp. 342 US 237, 243-45 29 LRRM 2249 (1952). Plumbers & Fitters, Local 761 v. Matt J. Zaich Construction Co. 418 F2d 1054, 1057-58, 72 LRRM 2979 (9th Cir. 1969). If there had been no prior Board Proceedings and the illegality...had been established in this action, the (plaintiff) could not have recovered the attorneys' fees attributable to that incremental effort. The result should be no different because this essential element was established in a separate proceeding before the Board." (523 F2d at 1381)3/

3/ As in Meads Market, the instant case illustrates the point. Long, which is not seeking attorneys' fees in this Section 303 action, did not file charges before the NLRB. Therefore it incurred no expenses of a prior proceeding under the Act. Long's proof in this suit of a violation of the Act clearly does not entitle it to recover attorneys' fees for such proof as a part of its damages. Yet, Northeastern is asking for fees in this suit as part of its damages for the same alleged violation of the Act, and apparently belives it is entitled to recover the fees merely because, unlike Long, it followed the alternate route of going first to the NLRB for relief. The NLRB did not (and would not have) awarded fees; nor should this Court.

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Appellant argues that Mead's Market may be distinguished from the instant case on a factual basis. The argument appears to be based on the premise that as the landlord of the industrial park, Northeastern was faced with "dependent third-party interests calling for protection," whereas such was not the case in Meads Market (Appellants' Brief, Page 25). Whether or not Northeastern was obligated or felt that it was obligated to try to end the Union's picketing, (no proof of such an obligation was adduced at trial), the fact remains that Northeastern is seeking reimbursement in this Section 303 suit for attorneys' fees. The Meads Market case, building on the foundation of the Alyeska decision, has squarely held that attorneys's fees are not recoverable in a Section 303 suit as a matter of law. That decision did not turn on factual distinctions of the sort claimed by appellants, and appellants attempt to make such distinctions in its brief (Point II (B) at page 23) creates a false issue in this case. Actually, should this Court determine that some attorneys fees may be awarded (Point II of this Brief) appellants' expressed position would require that the case be remanded for a determination of whether Northeastern, as the industrial park owner, was actually obligated to seek an end to the picketing or incurred attorneys' fees gratuitously under circumstances for which it is entitled to no recovery.

Finally, Appellant's reliance on the recent case of Everett Sillman and Gerald Williams, d/b/a Hoskings Food Products vs. Teamsters, Local 386, 535 F2d 1172 (CA 9, 1976) to show that the Ninth Circuit has

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modified its stand taken in the Meads Market case and has not "sanctioned" an award of attorneys fees is unfounded. In the Sillman case, the District Court Decision, rendered prior to the Meads Market Court of Appeals Decision, permitted, among other recoverable damages, the sum of $2,384.00 for legal fees and telephone expenses incurred in securing an end to illegal picketing. Both the Company and the Union appealed to the Ninth Circuit Court of Appeals.

Counsel for the Union herein have obtained the appeal briefs in the Sillman case. The Statement and Counter-Statement of issues submitted by appellant and appellee show that neither party questioned the District Court's award of attorneys' fees and telephone expenses, nor assigned that portion of the award as error on appeal. The Statement and Counter-Statement of issues are reproduced and set forth as Addendum (A) to this brief. As it is axiomatic that an Appellate Court will not address itself to issues not presented for determination on appeal, the affirmance on appeal of the District Court's Decision awarding attorneys' fees for prior NLRB proceedings without further discussion or analysis cannot be said to constitute the renunciation of a carefully reasoned rule of law.

Thus, for reasons of which counsel for appellant herein no doubt was unaware from a reading of the reported Decision alone, the Sillman case does not stand for the proposition for which the Appellants have cited it; namely, that the Ninth Circuit has in any way overruled, modified or retreated from its earlier holding in the Meads Market case.

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POINT II - ASSUMING, BUT NOT CONCEDING, THAT ATTORNEYS' FEES ARE RECOVERABLE, THIS COURT SHOULD REMAND TO THE DISTRICT COURT FOR FINDINGS OF FACT CONCERNING THE EXTENT TO WHICH, AND IN FAVOR OF WHOM, SUCH RECOVERY CAN BE HAD

A. Only Those Attorneys Fees Relating To Obtaining Resumption of Work May Be Recovered

Northeastern has requested this Court to reverse the District Court's Decision denying attorneys' fees, and to modify the Decision to award damages for such fees in the full amount claimed, or $30,506.45 (Appellant's Brief, page 29). In the event this Court reverses the District Court, however, the Union submits that further findings of fact are required.

Prior to the decision in Alyeska and Meads Market, it had been held in some circuits (though Defendant has found no Second Circuit case on the question) that reasonable attorneys' fees for certain prior proceedings under the Act may be recovered as an element of damages in a subsequent Section 303 suit. The fees awarded were limited, however, to those reasonable and necessary attorneys' fees related to obtaining an end to the picketing and the resumption of work after illegal secondary boycott activity. The Court in Meads Market was fully aware of such decisions allowing limited attorneys' fees and cited several examples in a footnote.[4/] In analyzing and rejecting them, the Meads Market Court

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4/ The cases cited by the Meads Market Court are: Refrigeration Contractors, Inc. v. Plumbers & Pipefitters Local 211, 501 F2d 668, 87 LRRM 2475 (5th Cir. 1974); Mason-Rust v. Laborers Local 42, 435 F2d 939, 76 LRRM 2090 (8th Cir. 1970); H. L. RObertson & Associates, Inc. v. Plumbers Local 519, 429 F2d 520, 74 LRRM 2872 (5th Cir. 1970); Sheet Metal Workers

commented:

> "The earliest case awarding such attorneys's fees simply asserts that fees paid 'to bring about the removal of the picket line...are proper items of damage.' Teamsters Local 984 v. Humko Co., 297 F2d 231, 243, 47 LRRM 2651 (6th Cir. 1961). Subseqyent cases simply cite the prior decisions, adding nothing to the rationale." (523 F2d at 1380).

The Union's position as stated in Point I of this Brief, is that all attorneys fees are an improper element of damages in this suit as a matter of law, and that none are recoverable. Assuming without conceding otherwise, however, even the earlier body of case law on the subject effectively overruled by Alyeska and Meads Market clearly requires that recovery be restricted to those reasonable and necessary legal fees rendered on behalf of Northeastern which relate to the section 10 (l) injunction issued by the District Court, since the District Court's temporary restraining order ended the picketing on April 9, 1971. No fees relating to the "subsequent" hearing before the NLRB Trial Examiner (now called Administrative Law Judge) or to the exhaustive briefs sumitted to him and, thereafter, to a panel of the NLRB itself, are recoverable in any event.

The bulk of the attorneys fees claimed as damages by Northeastern represents the legal services of Robert H. Jones, III, Esq. Mr. Jones' time records entered into evidence indicate that he spent a total of 74.8 hours

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4/ (Cont'd)
Local 223 v. Atlas Sheet Metal Co. 384 F2d 101, 65 LRRM 3115 (5th Cir. 1967); Gulf Coast Bldg. & Constr. Trades Council v. F.R. Hoar & Son, Inc. 370 Fed 746, 64 LRRM 2198 (5th Cir. 1967); Teamsters Local 984 v. Humko Co. 297 F2d 231, 47 LRRM 2651 (6th Cir. 1961). CF: Plumbers & Fitters, Local 761 v. Matt J. Zaich Constr. Co., 417 F2d 1054, 72 LRRM 2979 (9th Cir. 1969).

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in this matter beginning on April 1, 1971, when he was engaged, to April 9, 1971, when the picketing ended. If Mr. Jones' hourly rate of $85.00 is applicable, only $6,358.00 of this total billing of approximately $28,000 would be recoverable for services rendered through April 9, 1971. The great majority of Mr. Jones' fees involved services rendered after April 9, 1971. The Union strongly urges that no recovery for these legal services or disbursements be permitted in this action.

B. For Northeastern to Recover Attorneys' Fees, Such Fees Must be Necessary and Reasonable and Must Have Been Rendered For Northeastern and Not For Others

The Union introduced evidence that the prevailing hourly charge for labor attorneys in the Albany area in 1971 was $40.00 an hour for office work and $50.00 an hour for trial work. Mr. Jones testified that he charged $85.00 per hour. Even assuming that the entire range of legal services rendered by Mr. Jones prior to April 9, 1971 was for trial work, though this obviously was not the case, the reasonable value of Mr. Jones' services according to the Union's evidence would be $3,740.00, rather than $6,358.00, as measured by Mr. Jones' billing rate.

Moreover, the bills rendered by Mr. Jones for $28,326.44 for the period ending June 30, 1972 were issued jointly to Plaintiff Northeastern and to Rotterdam Ventures Inc. which is not a party to this action. All of these legal services benefitted both companies. (A113-A118). It would be inequitable to permit Northeastern to recover in its entirety the legal fees

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which benefitted another corporation as well as itself. The District Court made no findings of fact on this. Even more importantly, R & R Handling Centres, Inc., the primary object of the picketing which began on March 29, 1971 (and the only company with respect to which subsequent illegal picketing of other parties could be considered secondary), closed its business and terminated its occupancy of Northeastern Industrial Park on May 10, 1971 (A137 - 138). The NLRB unfair labor practice hearing was not held until June 1971 and the extensive briefs which obviously consumed so much time in their preparation were not written until even later. Once the primary employer no longer existed, the argument that the secondary employer had to be present and represented at the NLRB hearing to prevent the resumption of additional, illegal secondary picketing, has no validity. The Defendant would hardly be expected to resume pretextual and indirect picketing of a secondary employer for the alleged illegal purpose of affecting the now defunct primary employer.

Additionally, in an unfair labor practice case under the Act the primary responsibility for "prosecuting" an alleged statutory violation rests with the NLRB's General Counsel. Attorneys for the charging party, in this case Mr. Jones, participate in a supportive, or secondary role. The Union submits that findings of fact are required on the question of whether the extensive legal services rendered by Mr. Jones were necessary under the particular circumstances of this case, as well as whether they were reasonable.

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Frank Williams, Esq. also represented Northeastern. He spent a total of 24.6 hours up to April 9, 1971 (A157 - 159) on matters which he admitted benefitted Plaintiff Long (which has not claimed damages for attorneys fees in this action) and Rotterdam Ventures Inc. (which is not a party to this action). (A 161). Mr. Williams billed Northeastern alone, pursuant to an arrangement which he had with them, and was paid by Northeastern. Defendant submits that Mr. Williams' full fee of $1,230 (24.6 hours x $50.00 per hour which he testified was his hourly rate in a role supportive of Mr. Jones) cannot be recovered by Plaintiff Northeastern, but that at best only one-third of such amount, or $307.50 may be recovered.

For the aforementioned reasons, if this Court is constrained to conclude that attorneys' fees are recoverable in this Section 303 action, despite the Meads Market case, which is squarely on point, and the principles established by the United States Supreme Court in Alyeska, the award for such fees may only be made after findings of fact have been made by the trial court as to: (1) the amount of legal services incurred up to April 9, 1971, and their reasonable rate; (2) the portion of fees billed by Robert H. Jones, III and Frank Williams, attributable to appellant Northeastern rather than plaintiff Long or non-party Rotterdam Ventures Inc.; (3) The necessity and reasonableness of all fees rendered after April 9, 1971; and (4) those fees rendered for the period after May 10, 1971 when R & R Handling Centres, Inc. ended operations at the industrial park.

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POINT III - THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN ITS CONCLUSION THAT PLAINTIFF LONG WAS NOT REQUIRED TO COMPLY WITH THE PROVISION OF ITS COLLECTIVE BARGAINING AGREEMENT REQUIRING SUBMISSION OF THE INSTANT PROCEEDING TO ARBITRATION

Plaintiff Long and Local 294 were parties to a labor agreement (Defendant's Exhibit M) which they abided by (A167-169, A171 - 176, A192-193 A197, A190 - 203). Plaintiff Long made reports and required contributions thereunder on behalf of its employees to the Pension Fund and Welfare Fund (A167-169, A177 - 181), and used the grievance procedure (A198 - 203), all without objection or reservation. Although the labor agreement was not signed by the parties, it is not necessary that it be signed. (See Hamilton Foundry Co. v. Foundry Workers, 143 F2d 209 29 LRRM 2223 (1951), cert. denied 72 S. Ct. 1060, 30 LRRM 2258 (1952).

The grievance provision in the labor agreement (Defendant's Exhibit M, Article 8, Section 3(b)) that disputes be submitted to the grievance procedure"...prior to the institution of any damage suit action ..." makes this suit on behalf of Long contractually premature. In Old Dutch Farms Inc. vs. Milk Drivers and Dairy Employees Local Union 584 (CA 2-1966) 359 F2d 598, Cert. denied 385 U.S. 879 (1966) 62 LRRM 2007, this Court, in refusing to stay a Section 303 suit despite the existence of an arbitration clause, stated as follows:

> "This leads to the conclusion that absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one

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> party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intend to withdraw such disputes from judicial scrutiny." (62 LRRM at 2011)

The arbitration clause here in question contains that element which was lacking in Old Dutch Farms; namely, a clear and explicit statement that the grievance procedure must be used "prior to the institution of any damage suit action." See also Vulcan Materials Co. v. United Steelworkers of America, Local 2176, 430 F2d 446 (CA 5-1970); 74 LRRM 2818, and Bechtel Corp. v. Laborers Local 215, ___ F2d ___, Docket #76-1048 93 LRRM 2860 (C.A. 3, 1976) wherein the Third Circuit Court of Appeals held that an employer's Section 303 secondary boycott damage action was required to proceed to arbitration pursuant to the parties collective bargaining agreement prior to institution of a Federal Court Section 303 damage action.

Plaintiff Long should not be permitted to maintain this damage suit until it has properly exhausted the contractual grievance machinery. That machinery is preemptive of the question whether the conduct by Defendant toward Long was improper, so as to give rise to a claim for damages. The question first must be determined according to the intent of the parties as manifested in the procedures established by their labor agreement.

POZEFSKY, TOCCI & POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

POINT IV - THE DISTRICT COURT IMPROPERLY CONCLUDED THAT PLAINTIFF LONG WAS ENTITLED TO RECOVER FOR OVERHEAD EXPENSES

Even if the Union's conduct toward Plaintiff Long properly may be the subject of this suit at this time despite the parties contractual grievance procedure, Long still is not entitled to recover damages for overhead expenses, because it failed to prove that it lost business or profits because of the Union's conduct. While counsel for Long stated that one-third of the Long employees came to work during the period in question (A-143). Long's witnesses did not testify that the business of the corporation was damaged in any respect by the reduction in its work force, nor did they testify that as a result of the work force reduction there was a loss of profits. Absent such a showing, Plaintiff Long should be foreclosed in this case from recovering fixed operating expenses for the two-week period in question. Sheet Metal Workers Local 223 vs. Atlas Sheet Metal Co. of Jacksonville, 384 F2d 101 (CA 5, 1967); Mason Rust vs. Laborers Local 42, 435 F2d 939 (CA 8, 1970); Tenneco Chemicals v. Teamsters Local 401, 520 F2d 945, 90 LRRM 2147 (CA 3, 1975); Meads Market, supra.

The reason for this is clear. Unless it is shown that a Union's unlawful conduct caused an employer to suffer a dollars and cents business loss it cannot be said that the employer suffered compensable injury. The Supreme Court held in Teamsters Union v. Morton, 377 US 252 (1964)

POZEFSKY, TOCCI & POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

"that recovery for an employer's business losses caused by a Union's peac eful secondary activities proscribed by § 303 should be limited to actual compensatory damages "377 US at 260. It may be true that a Union's unlawful conduct causes an employer to loss the benefit of some of its labor force. However, the employer must be required to come forward in the subsequent Section 303 suit with proof eithe: (1) that increased costs were incurred in making alternate arrangements for productive output or (2) that the employer lost certain contracts and work and therefore, profits, as a result of the Union's conduct or (3) that extra overtime payments and overhead expenses were incurred in order to compensate for lost production time. There was no such proof submitted. Indeed, the only identifiable result of the Union's conduct based on evidence in the record apparently was the decrease in Plaintiff Long's payroll.

POZEFSKY, TOCCI
& POZEFSKY
ATTORNEYS AT LAW
113 STATE STREET
ALBANY, N. Y. 12207

POINT V - EVEN IF PLAINTIFF LONG HAD THE RIGHT TO RECOVER FOR OVERHEAD EXPENSES, ITS PROOF OF ACTUAL DAMAGE WAS SO SPECULATIVE THAT RECOVERY SHOULD HAVE BEEN DENIED BY THE DISTRICT COURT

With regard to Plaintiff Long's claim for $5,154.00 in fixed overhead expenses during the two-week period in question (A141 - 142 : A90 Plaintiff's Exhibit No. 8)/ Long came up with the following formula: The alleged operating and overhead expenses for the preceding eleven-month period were added together and divided by the number of weeks involved (A141-142). The resulting weekly figure was then multiplied by two. It is apparent that this formula is based on several erroneous assumptions.

For example, the "Equipment Maintenance" figure on Exhibit 8 includes the operating costs, including fuel and oil, for Long's equipment and trucks (A144). As Long's operations were curtailed during said period, it is unreasonable to assume, however, without specific proof, that equipment maintenance was as high for this two-week period as for any other two-week period during the eleven-month calculation base period.

Mrs. D'Ambrosio, the Controller of both Northeastern and Long, testified that "Terminal and Warehouse" expenses category was comprised of commissions on sales earned by Mr. McKenna (A147). In the first place, this item is not an overhead expense. If actual commissions were earned, it means that Long made sales and earned profit. Secondly, even if these commissions are in some fashion "overhead", the $1,974.00 reported for this expense represented gross sales of some

POZEFSKY, TOCCI & POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

sort, and it was clearly incumbent upon Plaintiff Long to place before the Court specific evidence of the sales made during this two-week period, as well as the rate of commission applicable thereto. It is entirely possible that no sales were made in the two-week period in question and the Union should not be penalized because Long failed to submit proof to the Court which it obviously has at its disposal.

The "Insurance and Safety" expense reported in Plaintiff's Exhibit No. 8 included various forms of insurance coverage, including Workmen's Compensation (. A143.). During the two-week period in question, there was a reduced working force and it is difficult to imagine how the formula used to compute the two-week expense claim took the work force reduction with regard to Workmen's Compensation payments into account. As for all the remaining insurance payments, Mrs. D'Ambrosio testified that the remaining office and administrative staff carried on their normal functions and therefore required the benefit of all the remaining blanket insurance coverage anyway (A150-151).

The"salaries" expense figure reported in Plaintiff's Exhibit No. 8 was made up of one factor, a yearly salary paid to James Palone (. A152). James Palone was out on disability before, during and after the two-week period in question and Plaintiff Long was continuing to pay his salary. If Long was paying Mr. Palone's salary without regard to whether he was working, certainly it is unfair to claim that the strike affected this obligation.

POZEFSKY, TOCCI & POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

Plaintiff's Exhibit No. 8 also includes the following expenses: "Office salary"; "Office Supplies and Expenses"; "Travel", "Other Office Expense", and "Miscellaneous Office Expense". Mrs. D'Ambrosio testified that these expenses included office workers salaries and office expenses and that during the two-week period in question, the office workers continued to work on their normal functions and office supplies continued to be used (. A153 - 154). Therefore, it is difficult to imagine in what way the Union is or may be responsible for said expenses. Similar reasoning applies to the expenses labeled as "Communication"; Miscellaneous"; Bank Charges" and "Other" in Plaintiff's Exhibit No. 8, for as Mrs. D'Ambrosio testified, these expenses were incurred whether the drivers were reporting for work or not (. A154).

The expense labeled "Taxes and Licenses" included, among others, mileage tax. Mileage tax, as testified to by Mrs. D'Ambrosio, is derived from actual miles driven (. A155). However, it is impossible to include such an expense during a period when Long's trucks were not being used and yet the formula used to calculate the expenses would mathematically allot a portion of the eleven-month's mileage taxes to the two-week period in question. Mrs. D'Ambrosio also testified that a portion of the taxes coming within this category were income taxes (A154). Similarly, Plaintiff's Exhibit No. 8 includes "payroll taxes" as one of the items in this category. It cannot be properly argued that the Union is responsible for Plaintiff's income taxes and payroll taxes as an item of damages.

POZEFSKY, TOCCI
& POZEFSKY
ATTORNEYS AT LAW
115 STATE STREET
ALBANY, N. Y. 12207

With regard to the "Equipment Rental" expense, Mrs. D'Ambrosio was unable to say whether or not Plaintiff Long rented any equipment or trucks during the two-week period in question (A155 - 156). Mr. Grimshaw testified that he thought that Long had rented between one and three "flatbeds" and possibly a tractor. Certainly Plaintiff Long had access to better and more accurate information to verify whether there were any rentals during the period in question. This is not the type of damage for which guesswork and speculation are proper substitutes for books and records, especially when such books and records are under the control of the party ostensibly relying upon them.

Based on the foregoing, it is submitted that Long's proof is far too speculative and that individual categories in Exhibit No. 8 fail to withstand even the most superficial analysis. By failing to meet acceptable standards of proof, Long has forfeited the right to recover these damages and should not be granted what in many respects appears to be a windfall gain.

POZEFSKY, TOCCI
& POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

CONCLUSION

AS TO APPELLANT NORTHEASTERN

Northeastern is not entitled to recover damages for attorneys fees and expenses. The District Court's denial of such attorneys fees and expenses was proper, as a matter of law, and should be affirmed.

Assuming without conceding otherwise, however, only those attorneys fees and expenses relating to obtaining an end to the Union's picketing are recoverable, and the case must be remanded to the District Court for further findings of fact concerning the recoverable amount of such fees and expenses.

AS TO PLAINTIFF LONG

The District Court erred in not dismissing Long's claim for damages, inasmuch as Long was required by the terms of its labor agreement with the Union to arbitrate disputes of the kind herein question before instituting this suit, and it failed to do so. That part of the District Court's decision awarding damages hould be set aside and Long's complaint dismissed.

The District Court further erred in permitting Long to recover damages for overhead expenses, in the absence of evidence of lost business or profits as the result of the Union's conduct. Moreover, the proof in the record as to Long's actual damages is too speculative and insufficient to support the District Court's award. That part of the District

POZEFSKY, TOCCI
& POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

Court's decision awarding damages to Plaintiff Long should be set aside and the Complaint dismissed, or the case should be remanded for a new trial on the issue of damages.

Dated: February 14, 1977

Respectfully submitted,

POZEFSKY, TOCCI & POZEFSKY
Attorneys for Defendant-Appellee

(ADDENDUM FOLLOWS)

POZEFSKY, TOCCI
& POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207

6. SEQUOIA EMPLOYERS COUNCIL:

Sequoia Employers Council provided advice on labor relations, negotiations and other general areas of employer-employee relations. (R.T. p. 350)

In 1966 Sequoia represented Hoskings in negotiations with Local 386 and during the period of the strike. (R.T. p. 351) Its expenses during the period March 23-May 28, 1966 were $570.86. (Pltfs'. Exs. 115, pp. 1-3)

— — —

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that Everett Sillman and Gerald Williams, d/b/a Hoskings Food Products, are entitled to damages in the amount of $24,174 for loss of profits in 1966 and 1967 resulting directly and proximately from Defendant's unlawful secondary activities in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act.

2. The District Court erred in holding that the Plaintiffs, Everett Sillman and Gerald Williams, d/b/a Hoskings Food Products, are entitled to damages in the amount of $7,422.00 as the savings which would have accrued had such lost profits been available to meet working capital requirements, thereby eliminating the necessity of resorting to deficit financing.

3. The District Court erred in holding that Everett Sillman and Gerald Williams, d/b/a Hoskings

Food Products, are entitled to damages in the amount of $1,728.00 for expenses paid to Sequoia Employers Council and expenses incurred by Sequoia Employers Council, paid directly to other sources by Hoskings, all of which were incurred to encourage continued patronage of Hoskings customers threatened by defendant's illegal secondary activities and to assist in the presentation of evidence involved in the unfair labor practice proceedings before the National Labor Relations Board which were designed to eliminate defendant's illegal activities.

4. The District Court erred in holding that Plaintiff Sillman, individually, is entitled to recover damages in the amount of $17,452.00 because the sales price on his partnership interest was depressed as a direct and proximate result of the defendant's illegal secondary activities.

5. The District Court erred in holding that Plaintiff Sillman's reservation to himself of a right to participate in the partnership recovery in this lawsuit is irrelevant in determining his right to recover additionally for damages incurred in the sale of his partnership interest.

6. The District Court erred in holding that the value of the doubly recovered claim at the time of the sale of the ownership interest was incapable of valuation and is not cognizable in computing damages.

7. The District Court erred in denying defendant's Motion To Alter Or Amend Judgment by reducing the amount of recovery to plaintiffs.

because Appellant's illegal secondary activities depressed the sales price of his partnership interest.

Subsequently, on August 24, 1973, the court issued Amended Findings of Fact and Conclusions of Law and Amended Judgment identical with the first, except that the award of attorneys' fees and costs for prosecution of the damages action was withdrawn (C.T. 551--574).

COUNTERSTATEMENT OF THE ISSUES

1. Whether, as a matter of law, the District Court erred in holding that Appellees Everett Sillman and Gerald Williams, d/b/a Hoskings Food Products, are entitled to damages in the amount of $24,174 for lost profits incurred in 1966 and 1967 as a result, direct and proximate, of Appellant's unlawful secondary activities in violation of Section 8(b)(4)(ii)(3) of the National Labor Relations Act.

2. Whether, as a matter of law, the District Court erred in holding that the Appellees Everett Sillman and Gerald Williams, d/b/a Hoskings Food Products, are entitled to damages in the amount of $7,422 as the savings which would have accrued had they not been forced to borrow money as a direct and proximate result of the loss of profits which resulted from Appellant's illegal picketing.

3. Whether, as a matter of law, the District Court erred in holding that Appellees Everett Sillman and Gerald Williams, d/b/a Hoskings Food Products, are entitled to damages

in the amount of $1,728 for expenses paid to Sequoia Employers Council, and for expenses incurred by Sequoia Employers Council and paid directly to other sources by Hoskings, all of which were incurred to encourage continued patronage of Hoskings' customers threatened by Appellant's illegal secondary activities, and to assist in the presentation of evidence involved in the unfair labor practice proceedings before the National Labor Relations Board, which were brought to eliminate Appellant's illegal activities.

4. Whether, as a matter of law, Appellee Sillman, individually, is entitled to recover damages in the amount of $17,452 because the sales price on his partnership interest was depressed as a direct and proximate result of the Appellant's illegal secondary activites.

5. Whether, as a matter of law, the District Court erred in holding that attorneys' fees are not recoverable for services performed in prosecuting the Section 303 damages action.

ARGUMENT

I. THE DISTRICT COURT'S AWARD OF LOST PROFITS TO APPELLEES IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE, AND THAT AWARD SHOULD BE AFFIRMED.

A. Introduction

Appellant Local 385's challenge to the judgment below is predicated not on a denial that Appellees suffered

LAW OFFICES
R. MENDELSON
PASTIFF
FRANCISCO STREET
FIFTH FLOOR
CISCO, CA 94108
433-1940

CERTIFICATION OF SERVICE

The undersigned, secretary to Pozefsky, Tocci & Pozefsky, mailed two (2) copies of the foregoing Brief of Appellee, Local 294, Teamsters, etc., on this date to Frank J. Williams, Jr., attorney for Appellant, 11 North Pearl Street, Albany, New York, 12207.

DATED: March 24, 1977

Debra J. Dewey

Debra J. Dewey
Secretary to Pozefsky, Tocci & Pozefsky
Attorneys for Appellee, Local 294, Teamsters, etc.

POZEFSKY, TOCCI
& POZEFSKY
ATTORNEYS AT LAW
112 STATE STREET
ALBANY, N. Y. 12207